

DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, CA 95814



September 18, 2006

Regulation Package #1005-17

CDSS MANUAL LETTER NO. CCL-06-02

TO: HOLDERS OF THE COMMUNITY CARE LICENSING MANUAL, TITLE 22,
DIVISION 6, CHAPTER 8, RESIDENTIAL CARE FACILITIES FOR THE
ELDERLY

Regulation Package #1005-17**Effective 8/10/06****Sections 87219 and 87219.1**

This manual letter has been posted on the Office of Regulations Development website at http://www.dss.cahwnet.gov/ord/Residentia_635.htm.

These proposed regulations add or make changes to the Criminal Record Clearance sections in six regulation categories; add or make changes to the Criminal Record Exemption sections in five regulation categories; and add or make changes to the Penalties sections in five regulation categories. All revised or added regulations are mandated by Health and Safety Code Sections 1522, 1568.09, 1569.17 and 1596.871, which were amended by Senate Bill (SB) 1240, Chapter 653, Statutes of 2004, Assembly Bill (AB) 358, Chapter 628, Statutes of 2004 and the Gresher v. Anderson decision (Alameda County Superior Ct. No. 8074577). SB 1240 increases an existing one-time civil penalty for allowing an individual to work or reside in a licensed facility without a criminal record clearance or exemption to an ongoing, per day civil penalty. SB 1240 also allows for the transfer of criminal history information between county and state licensing agencies. AB 358 expands the list of persons who are exempt from submitting fingerprints for a criminal background check. The Gresher v. Anderson Decision: permits certified family home employees to seek a criminal record exemption on their own behalf; permits terminated employees to seek a criminal record exemption after their employers received a notice from the licensing agency about his/her criminal history, without requiring that the notice caused the termination; requires that the licensing agency list the convictions that require a criminal record exemption; and requires that the licensing agency list the specific reason(s) the exemption was denied.

These regulations specify who must submit fingerprints for a criminal record review and who is exempt; that persons subject to a criminal record review be cleared or have a criminal record exemption prior to working or residing in a licensed facility; and the resulting civil penalty for violation of background check requirements. Section 87219 was amended to increase an existing one-time, \$100 background check violation civil penalty to a \$100 per day, for a maximum of five days civil penalty for initial violations and \$100 per day, for a maximum of 30 days, civil penalty for subsequent violations.

Section 87219.1 specifies the entire criminal record exemption process. Regulations were amended to allow certified family home employees to seek an exemption on their own behalf; permit terminated employees to seek an exemption after their employers received a notice from the licensing agency about his/her criminal history, without requiring that the notice caused the termination; require that the exemption needed notice, sent to the affected individual by the licensing agency, list the convictions that require an exemption; and require that exemption denial notices specify the reason the exemption was denied.

These regulations were adopted effective August 10, 2006 and were considered at the Department's public hearing held on February 15, 2006.

FILING INSTRUCTIONS

Revisions to all manuals are shown in graphic screen. The attached pages are to be entered in your copy of the Manual of Policies and Procedures. The latest prior manual letter containing Community Care Licensing changes was Manual Letter No. CCL-06-01. The latest prior manual letter containing Residential Care Facilities for the Elderly regulation changes was Manual Letter No. CCL-05-11.

<u>Page(s)</u>	<u>Replace(s)</u>
37 and 38	Pages 37 and 38
39.2 through 42	Pages 39.2 through 42
42.7 and 42.8	Pages 42.7 and 42.8
69 through 72	Pages 69 through 72

Attachments

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87219 CRIMINAL RECORD CLEARANCE (Continued)**87219**

- (f) Violation of Section 87219(e) will result in an immediate assessment of civil penalties of one hundred dollars (\$100) per violation by per day for a maximum of five (5) days by the Department.
 - (1) Subsequent violations within a twelve (12) month period will result in a civil penalty of one hundred (\$100) per violation per day for a maximum of thirty (30) days.
 - (2) The Department may assess civil penalties for continued violations as permitted by Health and Safety Code Section 1569.49.
- (g) Violation of Section 87219(e) may result in a denial of the license application or suspension and/or revocation of the license.
- (h) If the criminal record transcript of any of the individuals specified in Health and Safety Code Section 1569.17(b) discloses a plea or verdict of guilty or a conviction following a plea of nolo contendere for any crime other than a minor traffic violation for which the fine was less than \$300 and an exemption pursuant to Section 87219.1(a) has not been granted, the Department shall take the actions specified in Health and Safety Code Section 1569.17(c).
 - (1) For an initial applicant, the Department may deny the application.
 - (2) For current licensees, the Department may institute an administrative action, including, but not limited to, revocation of the license.
 - (3) For current employees, exclude the affected individual pursuant to Health and Safety Code Section 1569.58 and deny the application or revoke the license, if the individual continues to provide services and/or reside at the facility.
 - (4) For individuals residing in the facility, including spouses of the applicant, licensee, or employee, exclusion of the affected individual pursuant to Health and Safety Code Section 1569.58 and denial of the application or revocation of the license, if the individual continues to provide services and/or reside in the facility.

87219 CRIMINAL RECORD CLEARANCE (Continued)

87219

HANDBOOK BEGINS HERE

- (5) Section 1569.17(c)(4) of the Health and Safety Code provides in part:

If it is determined by the California Department of Social Services on the basis of the fingerprints submitted to the Department of Justice, that the person has been convicted of a sex offense against a minor, or has been convicted for an offense specified in Section 243.4, 273a or 273d, or subdivision (a) or (b) of Section 368 of the Penal Code, or has been convicted of a felony, the California Department of Social Services shall notify the licensee in writing within 15 calendar days of receipt of the notification from the Department of Justice to act immediately to terminate the person's employment, remove the person from the residential care facility for the elderly, or bar the person from entering the residential community care facility. The California Department of Social Services may subsequently grant an exemption pursuant to subdivision (f).

- (A) Section 243.4 of the Penal Code provides in part:

1. Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, gratification, or abuse, is guilty of sexual battery. Such an act is punishable by either imprisonment in the county jail for not more than one year or in the state prison for two, three, or four years.
2. Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, gratification, or abuse, is guilty of sexual battery. Such an act is punishable by either imprisonment in the county jail for not more than one year or in the state prison for two, three, or four years.

HANDBOOK CONTINUES

87219	CRIMINAL RECORD CLEARANCE (Continued)	87219
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- (j) The license shall maintain documentation of criminal record clearances or criminal record exemptions of employees in the individual's personnel file as required in Section 87566.
- (k) The licensee shall maintain documentation of criminal record clearances or criminal record exemptions of volunteers that require fingerprinting and non-client adults residing in the facility.
 - (1) Documentation shall be available at the facility for inspection by the Department.
- (l) The Department may seek verification from a law enforcement agency or court of an individual's criminal record as reported to the Department from any member of the public or affected individual.
 - (1) Upon obtaining confirmation from a law enforcement agency or court of the offense, the Department shall proceed as if this criminal record information was provided by the California Department of Justice.

NOTE: Authority cited: Section 1569.30 and 1569.49(d), Health and Safety Code. Reference: Section 1569.17 and 1569.49, Health and Safety Code.

87219.1 CRIMINAL RECORD EXEMPTION**87219.1**

- (a) The Department will notify a licensee to act immediately to terminate the employment of, remove from the facility or bar from entering the facility any person described in Sections 87219.1(a)(1) through (5) below while the Department considers granting or denying an exemption. Upon notification, the licensee shall comply with the notice.
- (1) Any person who has been convicted of, or is awaiting trial for, a sex offense against a minor;
 - (2) Any person who has been convicted of a felony;
 - (3) Any person who has been convicted of an offense specified in Sections 243.4, 273a, 273d, 273g, or 368 of the Penal Code or any other crime specified in Health and Safety Code Section 1569.17(c)(3);
 - (4) Any person who has been convicted of any crime specified below:
 - (A) Battery
 - (B) Shooting at Inhabited Dwelling
 - (C) Corporal Injury on Spouse/Cohabitant
 - (D) Discharging Firearm with Gross Negligence
 - (E) Exhibiting Weapon/Firearm
 - (F) Threat to Commit a Crime Resulting in Gross Bodily Injury or Death
 - (G) Criminal Threat to Harm or Injure Another Person
 - (H) Cruelty to Animals
 - (I) Willful Harm or Injury to Child; or
 - (5) Any other person ordered to be removed by the Department.
- (b) In addition to the requirements of Section 87219.1(a), the licensee must return the confirmation of removal form that is sent by the Department, within five (5) days of the date of the form, that confirms under penalty of perjury that the individual has been removed from the facility.
- (1) Confirmation must be made on either a Removal Confirmation – Exemption Needed, LIC 300A (Rev. 9/03), Removal Confirmation - Denial, LIC 300B (Rev. 9/03), Removal Confirmation - Rescinded, LIC 300C (Rev. 9/03), or Removal Confirmation - Nonexemptible, LIC 300D (Rev. 9/03).

87219.1 CRIMINAL RECORD EXEMPTION (Continued)**87219.1**

(c) After a review of the criminal record transcript, the Department may grant an exemption if:

- (1) The applicant/licensee requests an exemption in writing for himself or herself, or
- (2) The applicant/licensee requests an exemption in writing for an individual associated with the facility, or
- (3) The applicant/licensee chooses not to seek an exemption on the affected individual's behalf, the affected individual requests an individual exemption in writing, and
- (4) The affected individual presents substantial and convincing evidence satisfactory to the Department that he/she has been rehabilitated and presently is of such good character as to justify being issued or maintaining a license, employment or residence in a licensed facility.

(d) To request a criminal record exemption, a licensee or license applicant must submit information that indicates that the individual meets the requirements of Section 87219.1(c)(4). The Department will notify the licensee or license applicant and the affected individual, in concurrent, separate notices, that the affected individual has a criminal conviction and needs to obtain a criminal record exemption.

(1) The notice to the affected individual shall include a list of the conviction(s) that the Department is aware of at the time the notice is sent that must be addressed in an exemption request.

(2) The notice will list the information that must be submitted to request a criminal record exemption.

(3) The information must be submitted within forty-five (45) days of the date of the Department's notice.

(A) Individuals who submit a criminal record exemption request shall cooperate with the Department by providing any information requested by the Department, including, but not limited to, police reports and certified court documents to process the exemption request, pursuant to Section 87219.1(e).

(B) If the individual for whom the criminal record exemption is requested is an employee or resident other than a spouse or dependent family member and the licensee/license applicant does not submit the information listed in the Department's written notice within 45 days of the date of the notice, the Department may cease processing the exemption request and close the case.

(C) If the individual for whom the criminal record exemption is requested is an applicant, licensee, spouse or dependent family member and the licensee/license applicant does not submit the information listed in the Department's written notice within 45 days of the date of the notice, the Department may deny the exemption request.

87219.1 CRIMINAL RECORD EXEMPTION (Continued)**87219.1**

- (D) Individuals may request a criminal record exemption on their own behalf if the licensee or license applicant:
 - 1. Chooses not to request the exemption and
 - 2. Chooses not to employ or terminates the individual's employment after receiving notice of the individual's criminal history, or
 - 3. Removes the individual who resides in the facility after receiving notice of the individual's criminal history.
- (e) The Department shall consider factors including, but not limited to, the following as evidence of good character and rehabilitation:
 - (1) The nature of the crime including, but not limited to, whether it involved violence or a threat of violence to others.
 - (2) Period of time since the crime was committed and number of offenses.
 - (3) Circumstances surrounding the commission of the crime that would demonstrate the unlikelihood of repetition.
 - (4) Activities since conviction, such as employment or participation in therapy or education, that would indicate changed behavior.
 - (5) Granting by the Governor of a full and unconditional pardon.
 - (6) Character references.
 - (A) All character references shall be on a Reference Request form (LIC 301E - Exemptions [Rev. 7/03]).
 - (7) A certificate of rehabilitation from a superior court.
 - (8) Evidence of honesty and truthfulness as revealed in exemption application documents.
 - (A) Documents include, but are not limited to:
 - 1. A Criminal Record Statement (LIC 508, Criminal Record Statement [Rev. 1/03]) and
 - 2. The individual's written statement/explanation of the conviction and the circumstances about the arrest.

87219.1 CRIMINAL RECORD EXEMPTION (Continued)**87219.1**

- (9) Evidence of honesty and truthfulness as revealed in exemption application interviews and conversations with the Department.
- (f) The Department shall also consider the following factors in evaluating a request for an exemption:
 - (1) Facility and type of association.
 - (2) The individual's age at the time the crime was committed.
- (g) The Department may deny an exemption request if:
 - (1) The licensee and/or the affected individual fails to provide documents requested by the Department, or
 - (2) The licensee and/or the affected individual fails to cooperate with the Department in the exemption process.
- (h) The reasons for any exemption granted or denied shall be in writing and kept by the Department.
 - (1) Exemption denial notices shall specify the reason the exemption was denied.
- (i) The Department has the authority to grant a criminal record exemption that places conditions on the individual's continued licensure, and employment or presence in a licensed facility.
- (j) It shall be conclusive evidence that the individual is not of such good character as to justify issuance of an exemption if the individual:
 - (1) Makes a knowingly false or misleading statement regarding:
 - (A) Material relevant to their application for a criminal record clearance or exemption,
 - (B) His or her criminal record clearance or exemption status to obtain employment or permission to be present in a licensed facility, after the Department has ordered that they be excluded from any or all licensed facilities, or
 - (C) His or her criminal record clearance or exemption status in order to obtain a position with duties that are prohibited to him/her by a conditional exemption; or
 - (2) Is on probation or parole.
 - (A) If the individual is currently on probation, and provides sufficient proof that the probationary period(s) is informal, unsupervised and no probation officer is assigned, the Department may, in its discretion, grant a criminal record exemption notwithstanding Section 87219.1(j)(2).

87219.1 CRIMINAL RECORD EXEMPTION (Continued)**87219.1**

- (k) The Department shall consider granting a criminal record exemption if the individual's criminal history meets all of the applicable criteria specified in Sections 87219.1(k)(1) through (6) and the individual provides the Department with substantial and convincing evidence of good character as specified in Section 87219.1(c)(4). For purposes of this section, a violent crime is a crime that, upon evaluation of the code section violated and/or the reports regarding the underlying offense, presents a risk of harm or violence.
- (1) The individual has been convicted of one nonviolent misdemeanor, and one year has lapsed since completing the most recent period of incarceration or probation.
 - (2) The individual has been convicted of two or more nonviolent misdemeanors and four consecutive years have lapsed since completing the most recent period of incarceration, probation or parole, whichever is latest.
 - (3) The individual has been convicted of one or more violent misdemeanors and 15 consecutive years have lapsed since completing the most recent period of incarceration, probation or parole, whichever is latest.
 - (4) The individual has been convicted of one nonviolent felony and four consecutive years have lapsed since completing the most recent period of incarceration, probation or parole, whichever is latest.
 - (5) The individual has been convicted of two or more nonviolent felonies and ten consecutive years have lapsed since completing the most recent period of incarceration, probation or parole, whichever is latest.
 - (6) The individual has not been convicted a violent felony.
 - (7) If the individual is currently on probation, and provides sufficient proof that the probationary period(s) is informal, unsupervised and no probation officer is assigned, the period of lapsed time required in Sections 87219.1(k)(1) through (5) above shall begin from the last date of conviction(s).
- (l) It shall be a rebuttable presumption that an individual is not of such good character as to justify the issuance of an exemption if the individual fails to meet the requirements specified in Sections 87219.1(k)(1) through (6).

87219.1 CRIMINAL RECORD EXEMPTION (Continued)**87219.1**

- (s) The Department may consider factors including, but not limited to, the following in determining whether or not to approve the transfer of an exemption from one facility to another:
 - (1) The basis on which the Department granted the exemption;
 - (2) The nature and frequency of client contact in the new position;
 - (3) The category of facility where the individual wishes to transfer;
 - (4) The type of clients in the facility where the individual wishes to transfer;
 - (5) Whether the exemption was appropriately evaluated and granted in accordance with existing exemption laws or regulations; or
 - (6) Whether the exemption meets current exemption laws or regulations.
- (t) If the Department denies the individual's request to transfer a criminal record exemption, the Department shall provide the individual and the licensee with written notification that states the Department's decision and informs the affected individual of their right to an administrative hearing to contest the Department's decision.
- (u) At the Department's discretion, an exemption may be rescinded if it is determined that:
 - (1) The exemption was granted in error, or
 - (2) The exemption does not meet current exemption laws or regulations, or
 - (3) The conviction for which an exemption was granted subsequently becomes non-exemptible by law.

87219.1 CRIMINAL RECORD EXEMPTION (Continued)**87219.1**

- (v) The Department may rescind an individual's criminal record exemption if the Department obtains evidence showing that the individual engaged in conduct which is inconsistent with the good character requirement of a criminal record exemption, as evidenced by factors including, but not limited to, the following:
- (1) Violations of licensing laws or regulations;
 - (2) Any conduct by the individual that indicates that the individual may pose a risk to the health and safety of any individual who is or may be a client;
 - (3) Nondisclosure of a conviction or evidence of lack of rehabilitation that the individual failed to disclose to the Department, even if it occurred before the exemption was issued; or
 - (4) The individual is convicted of a subsequent crime.
- (w) If the Department rescinds an exemption the Department shall:
- (1) Notify the licensee and the affected individual in writing; and
 - (2) Initiate an administrative action.
- (x) If the Department learns that an individual with a criminal record clearance or exemption has been convicted of a subsequent crime, the Department, at its sole discretion, may immediately initiate an administrative action to protect the health and safety of clients.

NOTE: Authority cited: Section 1569.30, Health and Safety Code. Reference: Section 1569.17, Health and Safety Code; and Gresher v. Anderson (2005) 127 Cal. App. 4th 88.

87452 DEFICIENCIES IN COMPLIANCE (Continued)**87452**

2. The number of residents affected.
 3. The availability of equipment or personnel necessary to correct the deficiency.
 4. The estimated time necessary for delivery and any installation of necessary equipment.
- (B) The evaluator shall require correction of the deficiency within 24 hours and shall specify on the notice the date by which the correction must be made whenever penalties are assessed pursuant to Sections 87454(c), (d) and (e).
- (C) The date for correcting a deficiency shall not be more than 30 calendar days following service of the notice of deficiency, unless the evaluator determines that the deficiency cannot be completely corrected in 30 calendar days. If the date for correcting the deficiency is more than 30 days following service of the notice of deficiency the notice shall specify action which must be taken within 30 calendar days to begin correction.
- (5) The amount of penalty which shall be assessed and the date the penalty shall begin if the deficiency is not corrected by the specific due date.
- (6) The address and telephone number of the licensing office responsible for reviewing notices of deficiencies for the area in which the facility is located.

NOTE: Authority cited: Section 1569.30 and 1569.49, Health and Safety Code. Reference: Sections 1569.30, 1569.31, 1569.312, 1569.315, 1569.335, 1569.485, 1569.49 and 1589.49, Health and Safety Code.

87453 FOLLOW-UP VISITS TO DETERMINE COMPLIANCE**87453**

- (a) A follow-up visit shall be conducted within 10 working days following the latest date of correction specified in the notice of deficiency, unless the licensee has demonstrated that the deficiency was corrected as required in the notice of deficiency. No penalty shall be assessed unless a follow-up visit is conducted.
- (b) If a follow-up visit indicates that a deficiency was not corrected on or before the date specified in the notice of deficiency, the evaluator shall issue a notice of penalty.
- (c) A notice of penalty shall be in writing and shall include:
- (1) The amount of penalty assessed, and the date the payment is due.
 - (2) The name and address of the agency responsible for collection of the penalty.

87453 FOLLOW-UP VISITS TO DETERMINE COMPLIANCE (Continued)**87453**

- (d) When an immediate penalty has been assessed pursuant to Sections 87454(c), (d), (e) and (f) and correction is made when the evaluator is present, a follow-up visit is not required.

NOTE: Authority cited: Section 1569.30 and 1569.49, Health and Safety Code. Reference: Sections 1569.33, 1569.335, 1569.35, 1569.485, and 1569.49, Health and Safety Code.

87454 PENALTIES**87454**

- (a) A penalty of \$50 per day, per cited violation, shall be assessed for all serious deficiencies that are not corrected by the date specified in the notice of deficiency, up to a maximum of \$150 per day.
- (b) Notwithstanding Section 87454(a) above, an immediate penalty of \$100 per cited violation per day for a maximum of five (5) days shall be assessed if any individual required to be fingerprinted under Health and Safety Code Section 1569.17(b) has not obtained a California clearance or a criminal record exemption, requested a transfer of a criminal record clearance or requested and be approved for a transfer of an exemption as specified in Section 87219(e) prior to working, residing or volunteering in the facility.
- (1) Subsequent violations within a twelve (12) month period will result in a civil penalty of one hundred dollars (\$100) per violation per day for a maximum of thirty (30) days.
- (2) The Department may assess civil penalties for continued violations as permitted by Health and Safety Code Section 1569.49.
- (3) Progressive civil penalties specified in Sections 87454(d) and (e) shall not apply.
- (c) Notwithstanding Section 87454(a) above, an immediate penalty of \$150 per day shall be assessed for any of the following:
- (1) Sickness, injury or death of a client has occurred as a result of the deficiency.
- (d) When a facility is cited for a deficiency and violates the same regulation subsection within a 12-month period, the facility shall be cited and an immediate penalty of \$150 per cited violation shall be assessed for one day only. Thereafter a penalty of \$50 per day, per cited violation, shall be assessed until the deficiency is corrected.
- (e) When a facility that was cited for a deficiency subject to the immediate penalty assessment specified in Section 87454(d) above violates the same regulation subsection within a 12-month period of the last violation the facility shall be cited and an immediate penalty of \$1,000 per cited violation shall be assessed for one day only. Thereafter, a penalty of \$100 per day, per cited violation, shall be assessed until the deficiency is corrected.

87454	PENALTIES (Continued)	87454
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- (1) For purposes of Sections 87454(d) and (e) above, a regulation subsection is the regulation denoted by a lower-case letter after the main regulation number.

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An example of the same regulation subsection are Sections 87218(a)(2) and 87218(a)(5). Sections 87218(a) and 87218(b) are not the same regulation subsection.

HANDBOOK ENDS HERE

- (f) If any deficiency is not corrected by the date specified in the notice of deficiency, a penalty shall be assessed for each day following that date until compliance has been demonstrated.
- (1) Immediate penalty assessments as specified in (c), (d) and (e) above shall begin on the day the deficiency is cited.
- (g) If a licensee or his/her representative reports to the licensing agency that a deficiency has been corrected, the penalty shall cease as of the day the licensing agency receives notification that the correction was made.
- (1) If the deficiency has not been corrected, civil penalties shall continue to accrue.
- (2) If it can be verified that the correction was made prior to the date of notification, the penalty shall cease as of that earlier date.
- (h) If necessary, a site visit shall be made immediately or within five working days to confirm that the deficiency has been corrected.
- (i) If an immediate civil penalty is assessed and the deficiency is corrected on the same day, the penalty shall still be assessed for that day.
- (j) Unless otherwise ordered by the Department all penalties are due and payable upon receipt of notice for payment, and shall be paid only by check or money order made payable to the agency indicated in the notice.
- (k) The licensing agency shall have the authority to file a claim in a court of competent jurisdiction or to take other appropriate action for failure to pay penalties as specified in (j) above.

| NOTE: Authority cited: Sections 1569.30 and 1569.49(a), Health and Safety Code. Reference: Sections 1569.17, 1569.33, 1569.335, 1569.35, 1569.485, and 1569.49, Health and Safety Code.

87455 ADMINISTRATIVE REVIEW - GENERAL**87455**

- (a) A licensee or his/her representative may request in writing a review of a notice of deficiency, notice of penalty and/or health condition relocation order within 10 working days of receipt of the notice or order. This review shall be conducted by a higher level staff person other than the evaluator who issued the notice of deficiency, notice of penalty, and/or health condition relocation order.
- (1) Additional review requirements pertaining to Incidental Medical Services are specified in Section 87720.
- (b) If the reviewer determines that a notice of deficiency or notice of penalty was not issued in accordance with applicable statutes and regulations of the Department, he/she shall amend or dismiss the notice. In addition, the reviewer may extend the date specified for correction of a deficiency if warranted by the facts or circumstances presented to support a request for extension.

NOTE: Authority cited: Section 1569.30, Health and Safety Code. Reference: Sections 1569.30, 1569.33, 1569.335, 1569.35, 1569.485, 1569.49, and 1569.54, Health and Safety Code.